(1) Supreme Court, U.S.
FILED

031022 DEC 8 - 2003

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In the Supreme Court of the United States

QUANG DIHN NGUYEN,

Petitioner,

Versus

JOHN ASHCROFT, Attorney General of the United States;

Respondent.

On Petition for Writ of Certiorari to The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The United States Court of Appeals for the Ninth Circuit erred when it affirmed the District Court of the Western District of Washington denial of the Petitioner Petition for Writ of Habeas Corpus alleging the Board of Immigration Appeals erred and denied the Petitioner due process of law when it determined that the Petitioner had been convicted of a Particularly Serious Crime and was therefore ineligible for relief pursuant to 8 U.S.C. §1231(b)(3), INA 241(b)(3)

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OPINIONS AND ORDERS BELOW

The September 9, 2003 order of the Court of Appeals for the Ninth Circuit affirming the denial of the Petitioner's Writ of Habeas Corpus appendix hereto App 1.

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction to review the Ninth Circuit's affirmance of the denial of the Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case is 8 U.S.C §1253 (rewritten and recodified at 8 U.S.C §1231(b)(3)), Section 243(h) of the Immigration and Nationality Act.

STATEMENT OF THE CASE

Petitioner appeals the decision of the Court of Appeals for the Ninth Circuit affirming the District Court of The Western District of Washington's denial of the Petition for Writ of Habeas Corpus.

The facts are not in dispute in this action. Mr. Nguyen entered the United States on October 19, 1984 as a refugee. He is a native and citizen of Vietnam. His status was adjusted to permanent resident on May 28, 1986. On September 23, 1996, Mr. Nguyen was convicted in the Washington State Pierce County Superior Court of Delivery of a Controlled Substance, cocaine in violation of RCW §69.50.401(a)(1)(i). The acts which lead to his conviction occurred on March 29, 1996.

He was sentenced to 26 months suspended upon completion of six month detention at the Washington State "Boot Camp". On or about September 27, 1996, the Immigration and Naturalization Service, hereinafter Service, issued an Order to Show Cause (OSC) alleging that Mr. Nguyen was deportable for the above referenced conviction.

After completion of his incarceration with the State, Mr. Nguyen was transferred to Service custody on or about July 23, 1997. The Service then detained Mr. Nguyen under § 236(c) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(c), and placed him in detention pending the conclusion of his immigration proceedings.

Mr. Nguyen appeared before the Immigration Judge ("IJ") on August 10, 1997 and the IJ set bond at $7,500.00. Mr. Nguyen was released from custody on August 14, 1997. On May 28, 1998, Mr. Nguyen had an individual Hearing before the IJ wherein he requested Asylum and Withholding of Deportation. Pursuant to Immigration and Nationality Act (INA) 243(h), 8 U.S.C. § 1253(h) (former INA 243(h) was

revised and recodified at INA 241(b)(3), 8 U.S.C. §1231(b)(3). The IJ denied the requested relief and Mr. Nguyen appealed to the Board of Immigration Appeals (BIA). It should be noted that Mr. Nguyen requested INA section 212(c), 8 U.S.C. § 1182(c) as relief from deportation. However, the IJ pre-termitted the request prior to the Individual Hearing.

The BIA denied Mr. Nguyen's appeal and the case was dismissed. Mr. Nguyen then filed a Petition for Review to the Ninth Circuit Court of Appeals. He also requested a temporary stay of the Deportation Order, which was granted. The Petition was dismissed by the Ninth Circuit Court of Appeals on February 3, 2000.

On December 7, 2000, Mr. Nguyen filed a Petition for Writ of Habeas Corpus in the District Court for the Western District of Washington. On April 22, 2002, the district court adopted the magistrate's Report and Recommendation and dismissed the petition. Mr. Nguyen filed a Notice of Appeal to the Ninth Circuit Court of Appeals on May 17, 2002. On September 9, 2003, the Ninth Circuit Court of Appeals affirmed the district court.

A. The Decision of the Court of Appeals of the Ninth Circuit

On May 17, 2002, the Petitioner filed an appeal of the District Court for the Western District of Washington denial of the Petitioner's Petition for Writ of Habeas Corpus. The Court of Appeals found that the denial of relief requested pursuant to INA 241(b)(3), 8 U.S.C 1231(b)(3) was appropriate as it held that the Petitioner was precluded from relief as he posed a danger to the community as his crime was classified as "particularly dangerous".

REASON FOR GRANTING THE WRIT

The Petition for writ of certiorari should be granted as the determination of "particularly serious crime" with out an evidentiary hearing violates due process. As noted herein the BIA determined that Mr. Nguyen was ineligible for the relief he had requested as he had been convicted of a "particularly serious crime." The BIA's conclusion was incorrect and an abuse of discretion.

Mr. Nguyen was convicted of delivery of a controlled substance. He was not convicted of a crime of violence. There was no victim in his crime. When was sentenced to 26 months but only served a sentence of 6 months. This was Mr. Nguyen's only criminal conviction.

In United States v. Salerno, 481 U.S. 379, (1987) the this Court reviewed the meaning of "danger to the community" as it related The Bail Reform Act of 1984, 18 U.S.C. 3141. The Bail Reform Act requires a judicial officer to hold an evidentiary hearing to determine whether conditions or a combination of conditions of release will "reasonably assure the safety of any other person and of community". 18 U.S.C. 1342(e) If the government demonstrates at a hearing by clear and convincing evidence that the defendant is a danger to the community, then said defendant may be detained without bond.

To date, the only evidence that the Service has submitted regarding the danger that Mr. Nguyen posed was his conviction documents. By merely relying on the conviction documents, the Service can not establish by clear and convincing evidence that Mr. Nguyen was a danger to the community. See United States v. Chimurenga, 760 F.2d 400 (2d. Cir. 1985)

Counsel acknowledges that the BIA has ruled that an alien convicted of an aggravated felony is necessarily a

danger to the community. Matter of U-M, 20 I &N Dec. 327 (BIA 1991) However, it is the position of the respondent that this case law can be distinguished as a result of the passage of recent legislation.

It is Mr. Nguyen's position that he should not be denied an evidentiary hearing merely because of the conviction. A determination should depend on the specific facts of the crime for which he was convicted as balanced with the persecution that the respondent would face should he be returned to Cambodia. Castro-O'ryan v. INS, 847 F.2d 1307 (9th Cir. 1987)

In addition, the Minority Counsel to the Senate Subcommittee on Immigration Affairs has stated that Congress did not intend to bar criminal aliens from withholding of deportation. See Matter of K, I & N Dec. 418 (BIA 1993) BIA rejecting the comments of the Minority Counsel.)

The BIA has interpreted this exception to require only a determination of whether an alien's crime is "particularly serious"; according to the BIA, an alien convicted of a particularly serious crime necessarily constitutes a danger to the community. See, e.g., Matter of K-, 20 I. & N. Dec. 418, (BIA Nov. 5, 1991); Matter of Carballe, 19 I. & N. Dec. 357, 360, 1986 WL 67712 (BIA 1986)("The phrase 'danger to the community' is an aid to defining 'particularly serious crime,' not a mandate that administrative agencies or the courts determine whether an alien will become a recidivist.").

However, in Section 413(f) of AEDPA, Congress amended Section 243(h) of the INA to include a new subsection (h)(3). The new provision states, in relevant part:

Notwithstanding any other provision of law, paragraph (1) [the withholding provision] shall apply to any alien if the

Attorney General determines, in the discretion of the Attorney General, that ...

> (B) the application of paragraph (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.

8 U.S.C. § 1253(h)(3).

The benefit of the present provision may not, however, be claimed by a refugee for whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.
Art. 33.2, 19 U.S.T. at 6276(emphasis added).

Aliens convicted of "particularly serious crimes" are not eligible for withholding. Ramirez-Ramos v. INS, 814 F.2d 1394 (9th Cir. 1987) Also aliens convicted of "aggravated felonies are ineligible for withholding. Feroz v. INS, 22 F.3d 225 (9th Cir. 1994). As Mr. Nguyen's crime was for delivery he was therefore classified as an aggravated felon and convicted of a particularly dangerous crime. 8 U.S.C. §1101(a)(43), INA §101(a)(43) By using this categorical approach instead of reviewing the facts of the conviction, this denied Mr. Nguyen procedural due process. Reno v. Flores, 507 U.S.292 (1993)

By not allowing Mr. Nguyen a hearing on the issue of the seriousness of his crime, he was denied his protection of due process of the law. This protection includes the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V. ; Plyler v. Doe, 457 U.S. 202, 210 (1987); Mathews v. Diaz, 426 U.S. 67 (1976); Yamataya v. Fisher, 189 U.S. 86 (1903).

The current state of the law is clear if an individual is convicted of a drug crime then pursuant to statute he is therefore convicted of a particularly serious crime and an aggravated felon. However, this categorical approach denies the individual of due process in that the underlying facts of the crime should be reviewed before a determination is made at to the seriousness of the crime. By not allowing the Immigration Judge to review these facts it thus denies due process.

In affirming the decision of the district court the Court of Appeals determined that there was a presumption of seriousness of the crime. Matter of Carballe, 19 I & N Dec. 357 (BIA 1986) The Court merely looked at the sentence and the fact that the conviction was for delivery. This is insufficient to make a determination of whether the crime and or the petitioner is a danger to the community.

Based on this case law it is clear that the district court as well as the Ninth Circuit Court of Appeals erred and denied Mr. Nguyen due process when they determined that Mr. Nguyen had been convicted of a "particularly serious crime" and thus ineligible for withholding or asylum.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

QUANG DIHN NGUYEN, Plaintiff-Appellant, v. ROBERT COLEMAN, JOHN ASHCROFT,** Attorney General, Defendants-Appellees.	NO.02-3558 D.C.No.CV-00-02079-RSL MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Submitted February 14, 2003***
Seattle, Washington

Before: BRUNETTI, T.G. NELSON, and RAWLINSON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** John Ashcroft is substituted for his predecessor, Janet Reno, as Attorney General of the United States. Fed. R. App. P. 43(c)(2).

*** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Petitioner-Appellant Quang Dinh Nguyen ("Nguyen"), a native and citizen of Vietnam, appeals the district court's denial of his petition for a writ of habeas corpus. Nguyen is a lawful permanent resident ("LPR") who has been convicted in Washington state court for delivery of a controlled substance. The Immigration and Naturalization Service ("INS") seeks to deport Nguyen. Nguyen unsuccessfully opposed deportation in front of an Immigration Judge ("IJ"). The IJ's decision was affirmed by the Board of Immigration Appeals ("BIA") in a decision dated March 23, 1999 ("BIA Decision"). We dismissed Nguyen's petition for review of the BIA's decision for lack of jurisdiction. Nguyen v. INS. 210 F.3d 384 (9th Cir. 2000) (unpublished disposition). Nguyen then brought this habeas petition pursuant to 28 U.S.C. § 2241, which the district court denied. For the reasons stated below,, we affirm the district court. The

parties are familiar with the facts of the case and we refer to them here only as necessary.

As a preliminary matter, we note that although we dismissed Nguyen's direct appeal for lack of jurisdiction, we have jurisdiction to review the denial of his § 2241 habeas petition. INS v. St. Cyr, 533 U.S. 289, 314 (2001). A district court's decision to grant or deny a petition for habeas corpus is reviewed de novo. Taniguchi v. Schultz, 303 F.3d 950, 955 (9th Cir. 2002). Habeas petitions under § 2241 are limited to claims of constitutional or statutory error, and may not be used to challenge an exercise of discretion by the INS. Gutierrez-Chavez v. INS, 298 F.3d **8245** 829-30 (9th Cir. 2002).

1. **Denial of INA § 243(h) Relief**

Nguyen claims that the BIA erred in its determination that he was ineligible for Immigration and Nationality Act § 243(h) relief (Nguyen also claims that this was an abuse of discretion. As indicated above, however, we do not have jurisdiction to review the BIA's exercise of discretion.)

As we determined previously in Nguyen v. INS, 210 F.3d 384, the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") apply to this case. Under IIRIRA § 309(c)(1), IIRIRA's changes to INA § 243(h) do not apply to Nguyen. Thus, we apply former INA § 243(h), 8 U.S.C. § 1253(h) (rewritten and recodified at 8 U.S.C. § 1231(b)(3)).

INA § 243(h)(1) generally provides for mandatory withholding of

> deportation where the Attorney General determines that an alien's life or freedom will be threatened, in the country to which the alien is to be deported, because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. INA § 243(h)(2)(B) provides that INA § 243(h)(1) withholding does not apply if the Attorney General determines that "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." INA § 243(h)(2) states that for purposes of INA §

243(h)(2)(B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime."

INA § 243(h)(3) states that INA § 243(h)(2) will not bar INA § 243(h)(1) relief where the Attorney General determines that an alien's life or freedom will be threatened, in the country to which the alien is to be deported, because of the alien's race,, religion, nationality, membership in a particular social group, or political opinion, and the withholding of deportation is necessary to meet the United States' treaty obligations under the 1967 U.N. Protocol Relating to the Status of Refugees ("Protocol"). The BIA has established the following framework for analyzing INA § 243(h)(3) requests: if the aggravated felon was sentenced to 5 or more years, he or she is conclusively barred from relief, if less than 5 years, he or she is subject to a rebuttable presumption of ineligibility. BIA Decision, at 2. INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999), requires us to afford deference, under Chevron U.S.A., Inc. v. NRDC, 467 U.S. 83751842-43 (1984), to the BIA's framework for analyzing an INA § 243 (h) request.

The BIA determined, in light of Nguyen's conviction for delivering a controlled substance, that Nguyen's crime was particularly serious and that he constitutes a danger to the community. BIA Decision, at 2-3. This determination is supported by substantial evidence in the record bearing on the danger posed by drug trafficking and renders Nguyen ineligible for withholding under both INA § 243(h)(1) and INA § 243(h)(3).

Furthermore, under both of these provisions, Nguyen must establish, to the satisfaction of the Attorney General, that he faces a risk of persecution in Vietnam. The **IJ,,** however, after considering the failure to show past persecution or the risk of future persecution, determined that Nguyen did not face such a risk. The BIA affirmed this determination and it is supported by substantial evidence. This determination, like the determination that Nguyen poses a danger to the community, precludes Nguyen from INA § 243(h) relief

2. **Application of AEDPA to Request for INA § 212(c) Relief**

Prior to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and IRRIRA, former INA § 212(c), 8 U.S.C. § 1182(c), gave the Attorney General discretion to withhold deportation for certain aliens who had maintained a domicile in the United States for seven years. The AEDPA narrowed the scope of INA § 212(c), and then IIRIRA repealed it. Under the transitional rules of IIRIRA, its repeal of INA § 212(c) does not apply to this case. The AEDPA, by contrast, does apply, unless its application would have impermissible retroactive effect. That is the question we now address.

The AEDPA amended INA § 212(c) so as to preclude certain aliens, including aggravated drug felons such as Nguyen, from INA § 212(c) withholding. Magano-Pizano v. INS, 200 F.3d 603, 606 & n.2 (9th Cir. 1999). Thus, if not for the effect of the AEDPA, Nguyen would have been able to apply for INA § 212(c) relief. Nguyen challenges this bar imposed by the AEDPA as impermissibly retroactive. The AEDPA was enacted and generally became effective after Nguyen committed the drug trafficking offense, but before he pled guilty and before his deportation proceedings began.

In Landgraf v. USI Film Products, 511 U.S. 244 (1994), the Supreme Court established the following two-part test for determining if a statute can be applied retroactively: (1) if "Congress has expressly prescribed the statute's proper reach," then that prescription controls; otherwise, (2) if there is no such express statement from Congress, then courts "must determine whether the new statute would have retroactive effect." Id. at 280.

In St. Cyr, the Supreme Court applied the Landgraf test to determine whether IIRIRA's elimination of INA § 212(c) relief applied retroactively to an alien who had entered a guilty plea prior to IIRIRA's effective date. St. Cyr, 533 U.S. at 314-26. The Court first determined that IIRIRA did not have an express retroactivity provision. Id. at 314-20. The Court then moved on to the second step of the Landgraf test to determine if IIRIRA had an impermissibly retroactive effect. St. Cyr, 533 U.S. at 320-25. The alien in St. Cyr had not only committed the underlying offense prior to IIRIRA and the AEDPA, he had also pled guilty prior to those statutes. Id. at 293. This being the case, the Supreme Court noted that ineligibility for INA §

212(c) relief was "a new disability, in respect to transactions or considerations already past," id. at 321 (internal quotation marks and citation omitted), and that immigration consequences generally would factor into a plea agreement. Id. at 322. This reliance was particularly important given that INA § 212(c) had frequently been granted prior to the AEDPA and IIRIRA. Id. at 323. The Court ultimately held that INA § 212(c) relief is available for aliens who were convicted under a plea agreement and otherwise would have been statutorily eligible for such relief prior to IIRIRA. Id. at 326.

In Magano-Pizano v. INS, 200 F.3d 603, we considered whether the AEDPA's modification of INA § 212(c) applies to an alien who pled guilty before the AEDPA's effective date. We held that it did not, provided that the alien could show reliance on the availability of INA § 212(c) relief. Id. at 613-14. Although St. Cyr may have eliminated Magano-Pizano's requirement that an alien show actual reliance, these cases nonetheless stand for the proposition that INA § 212(c) relief remains available to those who entered a guilty plea before its modification (by

the AEDPA) or elimination (by IIRIRA), at least to the extent that it would have been available prior to the guilty plea.

The touchstone of St. Cyr and Magano-Pizano is the reliance that criminal aliens would have placed on the availability of certain immigration benefits, such as INA § 212(c) relief, in entering into a plea agreement. At that stage in their criminal proceedings, such aliens would have been represented by counsel, who would have had a duty to advise their clients of the immigration consequences of a guilty plea. St. Cyr, 533 U.S. at 322.

The present case differs from St. Cyr and Map-ano-Pizano, however, in one crucial respect: Nguyen pled guilty after the AEDPA modified INA § 212(c). This takes the present case out of the reach of those decisions. Indeed, as we stated in Magano-Pizano, "In general, denying eligibility for discretionary relief from deportation on the basis of past criminal convictions does not constitute an impermissible retroactive application of a statute." Magano-Pizano, 200 F.3d at 612. We went on to state, "It is difficult to argue, for example, that a convict would have refrained from

committing the criminal act if he had just known of the potential for future adverse deportation consequences." Id. In such a case, the basic principles of notice, reliance and fairness that underlie the Landgraf analysis do not militate strongly against retroactivity. This reasoning applies to Nguyen, who pled guilty after the AEDPA's effective date. We therefore conclude that the AEDPA applies to make Nguyen statutorily ineligible for INA § 212(c) relief

3. Equal Protection Challenge to INA § 212(h)

Under INA § 212(h), 8 U.S.C.§ 1182(h), the Attorney General has discretion to grant waivers of deportation (for those present in the country) or exclusion (for those returning to the country) for certain lawful permanent residents ("LPRs"). Aggravated felon LPRS, unlike aggravated felon non-LPRs, are barred from such relief under the plain terms of INA § 212(h). Nguyen challenges this distinction as an equal protection violation. Nguyen's argument is foreclosed by our recent decision in Taniguchi, 303 F.3d at 956-58.

The district court's denial of Nguyen's habeas petition is AFFIRMED.

Supreme Court, U.S.
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QUANG DIHN NGUYEN,

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SUPPLEMENTAL APPENDIX

United States District Court
Western District of Washington
At Seattle

Quang Dihn Nguyen	)	
	)	No. C00-2079L
Petitioner,	)	
	)	REPORT AND
	)	RECOMMENDATION
	)	
Robert Coleman.,	)	
	)	
Respondents.	)	
	)	

I. Introduction

Petitioner Quang Dihn Nguyen challenges his final order of deportation from United States by the Immigration and Naturalization Services ('INS') under 28 U.S.C.& 2241. This petition presented issues involving the intricate analysis of over lapping amendments to the INA made by IIRIRA and by AEDPA. Briefing by counsel for both parties gave rise to much consternation and left the Court wanting for the analysis. As a result, Respondent's Motion to Dismiss (Dkt.#9) will be granted only in part. Having reviewed

Respondent's motion and the remainder of the record, I recommend that Respondent's Motion to Dismiss be: granted as to petitioner's claims of unlawful denial of withholding and retroactive application of AEDPA; denied as the petitioner's equal protection claim and Respondent's Motion to Dismiss for lack of jurisdiction; and, stricken as moot as the petitioner's due claim. The remaining claim to be briefed by the parties is Petitioner's claim that his ineligibility for INA §212(c) relief is a violation of the right to equal protection of the Law under the Due Process Clause of the Fifth Amendment.

II. Facts and Procedural History

Petitioner entered to United States as a Vietnamese refugee on October 19, 1984. (Dkt.#7at 206). He is a native citizen of Vietman. (Id.). He adjusted to Permanent Resident status on May 28, 1986. (Id. At 198, 711). On September 23, 1996, Petitioner entered a guilty plea and was convicted in state court of a Violation of the Controlled Substance Act ("VUCSA") for delivered of a Controlled Substance,

cocaine. (Dkt.#3, Exh.B). He was sentenced to 26 months. As a result of his aggravated felony conviction, the INS initiated deportation proceedings on September 27, 1996. (Id., Exh.B. A). Petitioner completed his date court sentence, and on July 23, 1997, he was transferred to a custody of the INS. In August 1997 Petitioner was released from INS custody on $7500 bond. (Ind., Exh.C).

On August 18, 1998 Immigration Judge ("IJ") Anna Ho found petitioner deportable based upon the aggravated felony, INA &241 (a)(2)(A)(iii)[8 U.S.C.& 1251(a)(2)(A)(iii)], and ordered him deported to his native country of Vietman. (Id., Exh.D). Petitioner filed an Appeal to the Board of Immigration Appeals ("BIA") challenging the INS denial of his application for withholding of deportation. The BIA dismissed the appeal on March 23, 1999. (Id., Exh.D). Petitioner's deportation order became administratively final on that date. On April 19, 1999, Petitioner filed a petition for review with the Ninth Circuit Court of Appeals, No. 99-70455. (Id., Exh.F). The Petition

was dismissed by the Ninth Circuit Court on February 3, 2000,for lack of jurisdiction. (Id., Exh.G).

On July 26, 2000, the INS order to report for deportation (Dkt.7 at 13). Petitioner, represented by counsel, filed the Petition for Writ of Habeas Corpus on December 7, 2000. On January 16, 2001, this Court stayed his deportation pendente lite. (Dkt. #6). At this time, petitioner is not in INS custody.

III. Discussion

Respondent's Motion to Dismiss for Lack of Jurisdiction should be denied.

Respondent raised the issue of this Court's jurisdiction due the petitioner's status as an aggravated felon to a final order of deportation. (Dkt # 9 at 3). This Court, however, has jurisdiction to hear this matter because AEDPA and IIRIRA did not repeal the statutory habeas corpus remedy available via 28 U.S.C. §2241. See INS v. St. Cyr, 121 S. Ct. 2271, 2287 (2001). Accordingly, Respondent's Motion to dismiss for lack of jurisdiction should be denied.

A. The Appropriated statutory framework.

The transitional rules of IIRIRA apply to this case because deportation procedures were initiated on September 27, 1996, before IIRIRA's April 1, 1997 effective date and the BIA's March 23, 1999 final decision was entered after October 30, 1996. See Kalaw v. INS, 133 F. 3d 1147, 1150(9th Cir. 1997). Because Petitioner is governed by IIRIRA's transitional rules, IIRIRA's 'saving provision' applies.

IIRIRA & 309(c)(1). Under the saving provision Petitioner's challenge to his ineligibility for a waiver of deportation is governed by AEDPA & 440(d)'s amendment of INA §212(c). St. Cyr, 121 S. Ct. at 2289. This framework is crucial to the Court's consideration of the issues presented in the petition.

B. Respondent's Motion to dismiss the unlawful denial of withholding claim should be granted.

Review of the BIA's discretionary denial of applications for withholding of deportation raises the issue of this Court jurisdiction. The Ninth Circuit has held that under IIRIRA's transitional rules, this Court lacks jurisdiction to review the BIA's discretionary denial of Petitioner's application for withholding of deportation. Palmas- Rojas V. INS, 244 F. 3d 1191, 1192(9th Circuit 2001). (noting that transitional rules preclude review of discriminatory denials of relief from deportation); see also Matsuk v. INS, 247 F.3d 999, 1002(9th Circuit 2001).

Accordingly, Respondent's motion to dismiss this claim should be granted.

C. Respondent's motion to dismiss Petitioner's claim of unlawful denial of INA §212© relief should be granted in part and denied part.

1. Respondent's Motion to Dismiss Petitioner's claim that AEDPA was retroactively applied should be granted.

Petitioner alleges that the Immigration Judge erred by retroactively applying AEDPA and pretermitting his request for INA §212(c) [8U.S.C. §1182(c)] relief. Petitioner argues that the date he was charged with delivery, March 23, 1996 nearly one month before AEDPA's April 24, 1996, effective date, is the appropriate date to determinate his eligibility for a §212(c) waiver. But under Ninth Circuit law, eligibility for a 212(c) waiver is determined by the date he entered his guilty plea and, thus, was convicted. See Magana-Pizano v. INS, 200F. 3d. 603(9th Circuit 1999). AEDPA was not retroactively applied to Petitioner because he pleaded guilty nearly five months after AEDPA's effective date. Accordingly, Respondent's Motion to Dismiss Petitioner's claim should be granted.

2. Respondent's Motion to dismiss Petitioner's equal protection claim should be denied.

Ordinarily, habeas review of an equal protection claim begins with the issue of exhaustion of administrative

remedies. Here, Petitioner did not exhaust his equal protection claim because he did not raise it in his appeal to the BIA. INA §106(c); 8 U.S.C.§1105a(c). However, an exception exist when administrative remedies would be futile. America –Arab Anti-Discrimination Committee v .Reno, 70 F. 3d. 1045,1058(9th Cir.1995) rev'd on other grounds 525 U.S. 471(1999). Further, a constitutional challenge to an administrative action does not required exhaustion. Matthews v. Eldridge, 424 U.S. 319, 328-330 (1975). Because AEDPA eliminated the availability of §212(c) discriminatory relief for deportable aliens convicted of aggravated felonies, any application through the administrative process for & 212© relief would have been futile. Accordingly, this equal protection claim is properly before the Court on Respondent's Motion to Dismiss.

Respondent seeks to dismiss petitioner's equal protection claim because " AEDPA by its terms applies to all person in United States, citizens and noncitizens alike". (Dkt#9 at 7). Petitioner, as a deportable alien convicted of an

aggravated felony, falls into narrow period of time in which §212(c) did distinguish between deportable and excludable aliens. In re Fuentes-Campos interpreted AEDPA §440(d) amendment of §212(c) to make deportable aliens, but not excludable aliens, who had committed aggravated felonies and other offenses ineligible for discretionary relief. See Gutierrez-Perez v. Fasano, 37 F. Supp. 2d 1166, 1167n.4 (S.D. Cal 1999) (citations omitted), citing Fuentes-Campos, Interim Decision (BIA) 3318 (May 14, 1997) (en banc). Because §212 (c) relief, as amended, distinguished between deportable excludable aliens, this distinction is properly the subject of a Fifth Amendment equal protection analysis. Accordingly, Respondent's Motion to Dismiss Petitioner's equal protection claim should be denied.

3. Respondent's Motion to Dismiss Petitioner's due process claim should be stricken as moot.

Petitioner raises separates due process and equal protection claims in his petition. Because Petitioner is challenging an action by the federal government, he can only

rely on the Fifth Amendment's protection on his right of equal protection and due process. " Is well established that all individuals in the United States –citizens and aliens alike—are protected by the Due Process Clause of the Constitution. It is equal well established that the Due Process Clause incorporates the guarantees of equal protection" Garberding v. INS, 30F 3d 1187, 1190(9th Cir. 1994)(citations omitted). Petitioner's due process and equal protection claims are in effect a single claim: that his ineligibility for INA §212(c) relief violated his right to equal protection of the law under the Due Process Clause of the Fifth Amendment. Accordingly, Respondent's Motion to Dismiss Petitioner's due process claim should be stricken as moot.

IV. Conclusion

For the reasons set above I recommend that the Respondent's Motion to Dismiss (Dkt.#9) be granted and part and denied in part as follows: Granted as to Petitioner's claims of unlawful denial withholding and retroactive

application of AEDPA; Denied as to Petitioner's equal Protection claim and Respondent's motion to Dismiss for lack of Jurisdiction; and, Stricken as Moot as to Petitioner's due process claim. The remaining claim to be addressed by the parties is Petitioner's claim that his ineligibility for INA §212(c) relief violated his right to equal protection of the law under the Due Process Clause of the Fifth Amendment. A proposed Order accompanies this Report and Recommendation.